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No. 609

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wiennér, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and *the Associate Justices of the Supreme Court of the United States:*

The Petitioners, Emma R. Moist, individually and as assignee of Sidney M. Harvey and William T. McAlonan, et al., by their attorney, August F. Brandt, respectfully petition this Honorable Court for a writ of certiorari to review a judgment and opinion of the Court of Appeals for the Sixth Circuit rendered in this cause on June 17, 1967.

Your Petitioners respectfully show:

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is appended to this Petition and by reference made a part hereof. The opinion in the United States District Court for the Eastern District of Michigan, Southern Division has not been printed in the official reporter, but is found at pages 242a-248a of the Certified printed Transcript of the Record.

II.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit was rendered in this cause on June 17, 1967.

The statutory provision believed to confer jurisdiction on this Court to review the judgment of the Court of Appeals for the Sixth Circuit is Section 1254 of Title 28 of the United States Code Annotated.

III.

QUESTION PRESENTED FOR REVIEW

Does a federal court have jurisdiction of this suit as one arising under the Constitution and laws of the United States?

IV.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provisions and statutes which this case involved are as follows:

A. The jurisdiction of this court is invoked under the provisions of Section 1254 (1), Title 28, United States Code Annotated: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • • "

B. The right of the Court of Appeals to review the final decisions of the District Court dismissing petitioners' Complaint maintained under Section 1291, Title 28, United States Code Annotated: "The courts of appeals shall have

jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12 (e), 72 Stat. 348.

C. The plaintiffs in the District Court maintained that that court had jurisdiction to determine the cause under the following constitutional and statutory provisions respectively:

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1331 (a), Title 28, United States Code Annotated:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Section 1983, Title 42, United States Code Annotated:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. §1979."

Section 1985 (2), Title 42, United States Code Annotated:

> "* * * or if two or more persons conspire for the purpose of impeding, obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;"

V.

STATEMENT

The following facts have not been denied:—During 1936 and 1937, plaintiffs and one Susan L. Pearlstein were induced to invest $8,500.00 in Brookdale Syndicate Number One, the only money so invested, to enable one A. L. Waters to make a timely $7,500.00 down payment on his Option to purchase 140 acres of dedicated cemetery land for $40,000.00 (R. 12a-14a; 16a-18a; Plt. Exh. 1, 96a-103a; Plt. Exh. 5, 108a-109a). This syndicate, subsequently composed solely of plaintiffs, was expressly formed to acquire said land and to form a certain company to be known as "Brookdale Cemetery Association" by members of the syndicate as incorporators (R. Plt. Exh. 5, 108a).

Pursuant to the express terms of the aforesaid syndicate agreement, the record title to said land, subject to a purchase money mortgage of $32,500.00 (R. Plt. Exh. 7, 110a-115a), was thereafter vested in Brookdale Cemetery Association, incorporated as a Michigan non-profit, rural cemetery corporation (R. Plt. Exh. 8, 9, 10, 116a-124a).

No stock of Brookdale Cemetery Association was ever issued to any person, firm or corporation (R. 22a). On

August 31, 1940, the corporate Charter of Brookdale Cemetery Association became void for failure to file any annual reports and pay any annual franchise fees pursuant to Michigan law, and its corporate powers were never thereafter lawfully revived (R. 22a). Only plaintiffs, by virtue of their aforesaid syndicate investment and membership have ever had any claim whatever to the equitable and beneficial ownership of the assets of said defunct corporation.

During the period provided by Michigan law to wind up the affairs of the aforesaid defunct corporation, and after said Waters dropped out and abandoned said enterprise (R. 31a), Defendants Lewis surreptitiously induced certain of his associates to execute, as alleged "President" and "Secretary" of Brookdale Cemetery Association, warwanty deeds whereby 64 acres of said 140 acres of land were conveyed to Congregation Beth El and Mt. Sinai Memorial Cemetery Association (now Congregation Adas Shalom) for $110,000.00, all of which money Defendants Lewis were subsequently adjudged to have fraudulently misappropriated (R. 31a-36a; Plt. Exh. 23, 25, 26, 33, 42; 135a-152a; 155a).

Approximately eight months after Brookdale Cemetery Association was incorporated as a Michigan non-profit, rural cemetery, certain associates of said Waters incorporated Brookdale, Inc., as a Michigan profit corporation, to effectuate certain secret agreements Waters had made with them (R. 10a-20a; 26a-28a). On August 31, 1940, no annual reports ever being filed and no annual franchise fees ever being paid by Brookdale, Inc. pursuant to Michigan law, the corporate Charter of this corporation, penniless and wholly without assets since incorporation, also became void, and was never thereafter lawfully revived (R. 27a-29a; 38a).

On November 22, 1952, plaintiffs filed a Complaint against Defendants Lewis in the Circuit Court In Chancery for Wayne County, Michigan, which fairly required a trial of the issue of title and ownership of the remaining 68 acres of said land and an accounting (R. 45a-46a).

On February 29, 1956, the aforesaid State court adjudged the title and ownership of said 68 acres of land to be in plaintiffs, not as individuals, but as a corporate entity, and ordered Defendants Lewis to account (R. Plt. Exh. 33, 42, 148a, 156a, 160a). Thereafter, for over two years, except for the reluctant responses of Defendants Lewis to demands for an accounting pursuant to the express order of the State court, the State litigation was at an end (R. 66a, Plt. Exh. 33, 148a).

On March 21, 1958, acting in concert, the defendants, especially Defendant Sydney List, held guilty of false swearing and embezzlement and adjudged guilty of contempt in the State proceedings (R. 54a, Plt. Exh. 44, 161a-162a), and Defendants Lewis, standing exposed to conviction for fraud (R. Plt. Exh. 33, 149a-150a), began to *purposedly* conspire to bring about the appointment of one of their number as receiver of the two aforesaid defunct corporations by deliberately filing fraudulent claims against Brookdale Cemetery Association (R. 65a-66a). This purposeful conspiracy was deliberately designed to enable said defendants to obstruct and interfere with the laws of Michigan, and under color of law and by virtue of the power possessed by said receiver as an officer of the State, to deprive plaintiffs of rights of equality, equal protection of the laws and equal privileges under the law guaranteed by the Constitution and laws of the United States (R. 5a-6a).

On June 27, 1958, continuing to act in concert as aforesaid, defendants obtained the appointment of Defendant John R. Starrs as receiver of Brookdale Cemetery Association and Brookdale, Inc. (R. 50a). There was then actually $57,000.00 in cash belonging to Brookdale Cemetery Association readily available, a fact well known to defendants prior to said appointment, but not disclosed to the successor State circuit judge (R. 56a). Other than the aforesaid purchase money mortgage of record (R. Plt. Exh. 7, 110a-115a), Brookdale Cemetery Association, defunct since August 31, 1940, and never lawfully revived (R. 22a), had no bona fide creditors, and no lawful cemetery business had been operated on said 68 acres of land by it at any time, or by any other corporation since 1932 (R. 51a). Legally free from taxation, adequately fenced, with no improvements requiring upkeep, said land was steadily and substantially increasing in value (R. 51a-52a). As aforesaid, Brookdale, Inc., also defunct since August 31, 1940, and never lawfully revived, had always been penniless and wholly without assets since incorporation (R. 27a-29a).

On October 16, 1958, a claim of appeal was filed from an order of the State Court to sell the assets of Brookdale Cemetery Association, including said 68 acres of land, on the petition of Defendant Starrs as its receiver (R. 60a). Thereafter, on October 12, 1959, the Supreme Court of Michigan, on "the case as presented to it on the action of the trial court in authorizing the sale of assets, and particularly said 68 acres of land, and also the issue raised under the pleadings filed in the trial court as to the legal title and ownership of said land embraced in the order of sale," specifically adjudged the legal title and ownership of said land to be in Brookdale Cemetery Association and subject to the jurisdiction of the court in the receivership proceeding. *Harvey v. Lewis*, 357 Mich. 305, at pp. 307 and 314.

During pendency of the aforesaid appeal, Defendant Starrs, as receiver of Brookdale Cemetery Association, continuing to act in concert with the other defendants, and wrongfully using the power possessed by him as a State officer, established an entirely new cemetery business for such defunct corporation upon said 68 acres of mortgaged land, contrary to Michigan law, which expressly forbids continuing the business for which a corporation was organized more than 3 years after its Charter shall have become void:

> CL 1948, Sec. 450.75 (Stat Ann Sec. 21.75) All corporations whose charters shall have expired by limitation or dissolution or shall be annulled by forfeiture or in any other way or manner have become void shall nevertheless continue to be bodies corporate for the further term of 3 years from such expiration, dissolution or forfeiture for the purpose of prosecuting and defending suit for or against them and of enabling them gradually to settle and close their affairs and to dispose of and convey their property and divide their assets; *but not for the purpose of continuing the business for which such corporations were organized;* * * * (Emphasis added.)

and thereafter, Defendant Starrs, as receiver, using the power possessed by him as a State officer, wrongfully burdened said 68 acres of land with upwards of 6,000 graves (R. 87a), contrary to Michigan law, which expressly forbids the sale of burial rights upon mortgaged land:

> CL 1948, Sec. 456.109 (Stat Ann Sec. 21.879) Sec. 9 No mortgage or other lien or incumbrance, shall be executed upon any lands of such corporation, actually used for burial purposes, *and no right of burial upon any mortgaged lands of such corporation,* lands which are delinquent for taxes or special assessments or lands to which such corporation does not have title in fee, *shall at any time be granted or sold by it.* (Emphasis added.)

Furthermore, Defendant Starrs, as receiver, thereafter totally dissipated upwards of $417,000.00 realized from said unlawful burials, substantially in fees, expenses and commissions paid himself, his counsel, and Defendant Sydney List, and in addition thereto incurred additional liabilities of $112,738.05 (R. 57a, 87a-88a), without making any provision whatever to establish a perpetual care fund for said graves, estimated to be $360,000.00, also expressly required by Michigan law:

> CL 1948, Sec. 456.107 (Stat Ann Sec. 21.897) Sec. 7. It shall be the duty of such board of directors to preserve good order in the grounds of such cemetery; * * * to establish an irrevocable endowment fund or funds to provide income for the purpose * * *, such fund to be governed by the terms of provisions of section 7a, hereof; * * *.
>
> CL 1948, Sec. 456.107a (Stat Ann Sec. 21.877(1) Sec. 7a(1) The fund required to be set aside under Section 7 for the purpose of keeping the grounds of such cemetery in good condition shall be a minimum of $5,000 for each acre of land owned by said cemetery and hereafter developed for cemetery purposes.

On March 23, 1960, Defendant Starrs, continuing to act in concert with the other defendants, purporting to act under the authority of the State, wrongfully using the power possessed by him as receiver to further said conspiracy, declared the sole and entire outstanding stock of Brookdale Cemetery Association to be 1,500 shares of capital stock, and that all and singular the ownership thereof was in himself as receiver of Brookdale, Inc., and no other person, firm or corporation whatsoever. He thereupon created a new stock register for said Brookdale Cemetery Association, and issued a single certificate for such 1,500 shares of capital stock to himself as receiver of Brookdale,

Inc. (R. Plt. Exh. 58, 188a-190a). Thus, *without any consideration whatever passing,* he arbitrarily transferred all of the assets of the one defunct, non-profit, rural cemetery corporation, *including its record title to said 68 acres of dedicated cemetery land,* to the other defunct, profit corporation, previously penniless and wholly without assets since incorporation (R. 27a-28a), while both were under his dominion as such a State officer.

On April 1, 1960, Defendant Starrs, continuing to act in concert with other defendants, and wrongfully using the power possessed by him as receiver for the express purpose of completing the principal object of said conspiracy, likewise created a new stock register for defunct Brookdale, Inc., and issued new certificates of its stock representing 91.7% of its ownership to Defendants Lewis and Tsangadas (R. Plt. Exh. 59, 191a-194a), arbitrarily destroying plaintiffs' previously adjudicated 100% ownership of said 68 acres of land as a corporate entity (R. Plt. Exh. 42, 156a, 160a).

On June 16, 1961, Defendant Starrs, continuing to wrongfully use the power possessed by him as receiver, arbitrarily compromised the fraudulent claim of his co-conspirator Harris W. Wienner, for alleged legal services rendered Brookdale Cemetery Association in 1937 (R. 19a), never proven, submitted for the first time to effect his appointment as receiver (R. Plt. Exh. 61, 195a-196a).

On October 12, 1965, Defendant Starrs, charged with conflict-of-interest resigned as receiver of Brookdale Cemetery Association when it was disclosed he had secretly joined Defendant Sydney List as a partner in the Eagle Stone and Monument Compay, which sold most Brookdale grave markers, and he had engaged in other community-shocking misconduct and indiscretions incompatible with

his position as an officer of the court (R. 87a-88a, Plt. Exh. 3, 104a). Defendant List was paid $85,000.00. Defendant Starrs, in addition to his Eagle Stone and Monument Company earnings and exorbitant receivership fees already paid him (R. 57a), now claims additional receivership fees of $60,000.00 for the period ending February 23, 1963 with interest at 6% until paid (R. 88a), plus fees up to October 12, 1965, the date he resigned, yet undetermined.

The receivership milked dry by Defendants Starrs, Beattie, List and McKenney (R. 57a, 59a, 87a-88a), after Defendant Starrs resigned, the said 68 acres of dedicated cemetery land was thereafter immediately pledged to secure a loan of $5,000.00 (R. 88a). Despite this fact, Defendant Bernard Belk, as successor receiver, has continued to sell burial rights and wrongfully burden said mortgaged land with additional graves (R. 90a), contrary to Michigan law (CL 1948, Sec. 456.109, supra), which expressly forbids the sale of burial rights upon mortgaged land.

On November 5, 1965, based solely on the petition of Defendant Harris W. Wienner for a Public Sale of Assets, the sale of said 68 acres of dedicated cemetery land was ordered to pay such judgment creditor (R. Plt. Exh. 62, 197a-198a), contrary to Michigan law:

> CL 1948, Sec. 623.43 (Stat Ann Sec. 27A 6023) The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: * * *
>
> 3. All cemeteries, tombs and rights of burial, while in use as repositories of the dead.

On December 22, 1966, the District Court granted the motion of defendants to dismiss the Complaint filed herein before answer and trial (R. 242a-253a), and plaintiffs subsequently perfected an appeal from such orders.

On June 17, 1967, the Court of Appeals sustained the motion of defendants to dismiss the aforesaid appeal on the erroneous assumption that all issues pleaded in the District Court have been, or could have been raised in the State courts (App. A-1, infra, pp. 29, 32, 33).

REASONS FOR GRANTING WRIT

The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of law administration. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court. Only the issue of a writ of certiorari will now give meaning to the Constitution of the United States and its statutes, and enhance respect for the equal and just application of the law in every place, at every time and to every man.

Plaintiffs have alleged that defendants, acting in concert, purposefully engaged in a forbidden conspiracy set forth in Section 1985, 42 United States Code to bring about the appointment of one of their number as receiver of Brookdale Cemetery Association, a non-profit, rural cemetery corporation, by filing fraudulent claims against such corporation, and thereafter proceeded to use, contrary to Section 1983, 42 United States Code, the power possessed by said defendant, as an officer of the State, to wrongfully change the title and ownership of certain land, and procure the allowance of said claims. And, plaintiffs have clearly shown that such actionable wrong to have fully matured, whereby plaintiffs have suffered substantial injury and all of the defendants have materially and substantially profited thereby.

Plaintiffs also charge the facts, as alleged, show defendants were conscious of wrongfully trying to influence the law, or were endeavoring to obstruct or interfere with it, and they so manipulated the law or its agencies to give sanction or sanctuary for doing so, depriving plaintiffs "of having and exercising", a federal right, which brings the case within the aforesaid Acts. The conspiracy charged is not merely that to deprive plaintiffs of rights, but of the deprivation of equality, of "equal protection of the law", or of "equal privileges and immunities under the law".

The object of Section 1983 is to protect persons against misuse of power possessed by virtue of state law and made possible because the wrongdoer is clothed with authority of state law. *Davis v. Johnson,* 138 F. Supp. 572 (D. C. Ill. 1955). Petitioners claim that the acts of defendants constituted a deprivation of their rights, privileges and immunities secured by the Constitution, within the meaning of Sections 1983 and 1985, 42 United States Code.

The aim of the aforesaid federal Acts was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. It was not the inavailability of state remedies but the failure of the state to enforce the laws with an equal hand that brought about the enactment of the aforesaid Acts. The remedy was created against those who represented a state in some capacity who were unable or unwilling to enforce a state law. *Monroe v. Pape,* 365 U.S. 167, at pp. 174, 175 and 184.

In *Brouwer v. Kent County Clerk,* 377 Mich. 616 (1965), at pp. 643 and 644, it is said:

> "• • • the equality clause, as our judicial history tells us, is not limited only to the protection of those fundamental rights that are granted by the Federal Constitution or otherwise protected by it; rather, it extends its protective cover to all rights,

whether granted by Federal or State Constitutions, congressional or legislative enactments, executive order or otherwise, and against all forms of State action, executive, legislative, or even judicial. *Ex Parte Virginia* (1880), 100 U.S. 339 (25 L. ed. 676); *Louis K. Liggett Co. v. Lee* (1933), 288 U.S. 517 (53 S. Ct. 481, 77 L. ed. 929, 85 ALR 699); *Hillsborough Township v. Cromwell* (1946), 326 U.S. 620 (66 S. Ct. 445, 90 L. ed. 358); *Shelley v. Kraemer* (1948), 334 U.S. 1 (68 S. Ct. 836, 92 L. ed. 1161, 3 ALR 2d 441); *Wheeling Steel Corp. v. Glander* (1949), 337 U.S. 562 (69 S. Ct. 1291, 93 L. ed. 1544); *Dowd v. United States, ex rel. Cook* (1951), 340 U.S. 206 (71 S. Ct. 262, 95 L. ed. 215, 19 ALR 2d 784); *Barrows v. Jackson* (1953), 346 U.S. 249 (73 S. Ct. 1031, 97 L. ed. 1586); *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483 (74 S. Ct. 686, 98 L. ed. 873, 38 ALR 2d 1180); *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia* (1957), 354 U.S. 457 (77 S. Ct. 1344, 1 L. ed. 2d 1485). To put it another way, as the Supreme Court has:

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' *Ex Parte Virginia,* 100 U.S. 339, 347

(25 L. ed. 676, 679). Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia v. Rives*, 100 U.S. 313 (25 L. ed. 667); *Pennsylvania v. Board of Directors of City Trusts of Philadephia*, 353 U.S. 230 (77 S. Ct. 806, 1 L. ed. 2d 792); *Shelley v. Kraemer*, 334 U.S. 1 (68 S. S. Ct. 836, 92 L. ed. 1161, 3 ALR 2d 441), or whatever the guise in which it is taken, see *Derrington v. Plummer* (CCA 5), 240 F. 2d 922; *Department of Conservation & Development, Commonwealth of Virginia v. Tate* (CCA 4) 231 F. 2d 615." *Cooper v. Aaron* (1958), 358 U.S. 1, 16, 17 (78 S. Ct. 1401, 3 L. ed. 2d 5, 19).

The District Court, before answer and before trial, granted defendants' motions to dismiss this cause on the wholly erroneous assumption the present action was brought to obtain relief from a judgment of the Supreme Court of Michigan, *Harvey v. Lewis*, 357 Mich. 305, 98 N.W.2d 599, and the parties to the State action and the parties to the present action are the same (R. 243a).

Only 5 of the present 14 defendants, namely the three Lewis brothers, Brookdale Cemetery Association and Brookdale, Inc., defunct Michigan corporations, were defendants in the prior State court proceedings (R. 1a, Plt. Exh. 42, 153a).

The Court of Appeals, under the most unusual circumstances, arbitrarily concluded an appeal from the aforesaid order to be frivolous, but it appears knowledgeable title insurance companies do not think plaintiffs' contentions are frivolous (App. A-1, infra, pp. 32, 40).

In reaching its decision the Court of Appeals relies on two principal lines of reasoning, each of which is erroneous:

1, Plaintiffs' contentions, made in the complaint, have been adjudicated against them by the Supreme Court of Michigan in *Harvey v. Lewis,* 357 Mich. 305, supra, 98 N.W.2d 599 (App. A-1, infra, pp. 32-33).

The State trial court adjudged the title and ownership of the land in question to be in plaintiffs, not as individuals, but as a corporate entity, viz. "Brookdale Cemetery Association" (R. Plt. Exh. 42, 156a, 160a), *Harvey v. Lewis,* 357 Mich. 305 at p. 312. The only issue submitted to the Supreme Court of Michigan more than three years later involved the action of the trial court in authorizing the sale of assets of Brookdale Cemetery Association, particularly of certain real estate, and the issue raised in the State circuit court under the pleadings there filed as to the legal title and ownership of the land embraced in the order of sale. That Court in *Harvey v. Lewis, supra,* 357 Mich. 305, at pp. 307 and 314, modified the decree of sale, and specifically adjudged the title and ownership of the land in question to be in Brookdale Cemetery Association, incorporated as a Michigan non-profit rural cemetery corporation pursuant to the express provisions of Brookdale Syndicate Agreement Number One, composed solely of plaintiffs (R. 12a-14a; 16a-18a, Plt. Exh. 5, 108a-109a).

The present case is upon a different, subsequent cause of action, and the controversy is genuine and present, not merely a possible or conjectural one. The parties involved in the State action and the present action are not the same. The plaintiffs claim the present suit involves a dispute or controversy respecting the validity, construction, or effect of federal laws, upon the determination of which the result depends.

In *United States Fidelity & Guaranty Co. v. McCarthy,* 33 F. 2d 7, at pp. 9 and 10, it is said:

> "* * * the inquiry must always be to the point or question litigated and determined in the original

action, not what might have been thus litigated. Only upon such matters is the judgment conclusive in another action." • • •

"But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel upon the determination of which the judgment or decree was rendered." • • •

"In *Radford v. Myers,* 231 U.S. 725, 730, the court said: 'As the suit in the Michigan court was not upon the identical cause of action litigated in the United States Circuit Court the estoppel operates only as to the matters in issue or points controverted and actually decided in that suit.' "

The party seeking to invoke the doctrine of estoppel by judgment or collateral estoppel must show (1) that the issue which his opponent wishes to litigate has already been completely litigated and (2) that such adjudication was rendered in a proceeding where the two were adversaries. *Hellenic Lines, Limited v. The Exmouth,* 253 F.2d 473, cert denied 356 U.S. 967, 2 L.ed2d 1074.

A matter cannot be *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the person or parties, the quality of persons for or against whom the claim is made, and the judgment in former action to be so in point as to control the issue in the pending case. *Hartford Accident & Indemnity Co. v. Jasper* 144 F.2d 266.

2. Plaintiffs have had full opportunity to seek an adjudication of all issues raised in their complaint during the litigation in the State courts (App. A-1, infra, p. 32).

The right to pursue remedies under federal Civil Rights Act is not abrogated by availability of state remedies 42 USCA, Sec. 1983. *York v. Story,* 9 CA (1963), 324 F.2d 450, cert denied 85 SCt 794, 376 US 939, 11 L. ed 2d 659.

Even if plaintiff had a complete remedy in state courts, * * * plaintiff was not thereby precluded from bringing action under federal Civil Rights Act, 42 U.S.C.A., Sec. 1983. *Cohen v. Norris,* 9 CA (1956), 300 F.2d 24. Relief is not to be denied under federal civil rights statutes because of failure to exhaust available state remedies of either administrative or judicial nature. *Powell v. Workmen's Comp. Bd. of State of N.Y.,* 327 F.2d 131 (1965).

According to established doctrine, the Fourteenth Amendment itself, "speaks to the State or those acting under color of its authority", and Section 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights.

The benefits of the Civil Rights Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state. *Batista v. Weir,* 3 CA (1965), 340 F.2d 74.

The law is designed as a protective shield for citizens of any color, and the violation of the civil rights of any citizen, regardless of color, affords a cause of action to that person under the statute (42 USCA, Sec. 1983). If a factual controversy exists under the allegations of the Complaint, it may not be determined on a Motion to Dismiss or Motion for Summary Judgment. *Jordan v. Kelley,* (1963), 223 F. Supp. 731.

On a motion to dismiss before trial, the district court and the Court of Appeals were obligated to treat as true all well pleaded factual allegations of the complaint in determining if an action was stated which would entitle plaintiff to relief. *Lee v. Hodges,* 4 CA (1963), 321 F.2d 480; *Duzynski v. Nosal,* 7 CA (1963), 324 F.2d 924.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. On a motion to dismiss for failure to state a cause of action, a plaintiff is entitled to all reasonable presumptions. A conclusion by the Court of Appeals that plaintiff has not met this first test does not preclude a later summary disposition of all or part of the case when the district court comes to consider plaintiff's legal contentions in the light of appropriate findings of fact. It may be that the proof will fall short of the allegations and that even if proved they will, in their fully developed context, not attain the level of federally remedial constitutional and statutory deprivations. However, the plaintiff is entitled to his day in court and a hearing. *Lee v. Hodges,* 4 CA (1963), 321 F.2d 480, at p. 486.

In *Roberts v. Trapnell,* D.C. Pa (1962), 213 Supp. 49-51, it is said:

> "All that is necessary to prevent the dismissal of a Complaint brought under 42 USCA, Sec. 1983 is that it allege facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment. *Monroe v. Pape* (1961), 365 U.S. 167, 171, 81 S. Ct. 473, 5 L. ed. 2d 492.
>
> See *Douglas v. City of Jeanette, Pa.,* 319 U.S. 157, 161, 162, 63 S. Ct. 877, 87 L. Ed. 1324 (1943)
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> • • •
>
> • • • this Court is unable to state that it does not appear beyond doubt that the minor plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See *Hughes v. Noble,* 295 F. 2d 495, 496 (5 Cir. 1961). He should, therefore, on the present state of the record, be given an opportunity to prove his allegations. See *Cohen v. Norris,* 300 F. 2d at pp. 32-33."

In *Marshall v. Sawyer*, 9 CA (1962), 301 F.2d 639, at pp. 646 and 647, it is said:

> "The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States. • • •"
>
> "The defendants' conduct was engaged in under color of state law if they were clothed with the authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized, or, indeed, even proscribed by state law. *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. ed. 2d 492; *Screws v. United States*, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. ed. 1495. Whether there is 'color' of state law is a federal, not a state question." • • •
>
> "A complaint is not subject to dismissal upon a claim that the complaint does not state a claim upon which relief can be granted, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. ed. 2d 80."

A motion urging dismissal of an appeal on grounds that it presents no substantial question for review, is frivolous or not taken in good faith should be granted only in extreme cases. *Morrison v. Texas Company*, 7CA (1961), 289 F.2d 382; *Cohen v. Curtis Publishing Company*, 8CA (1964), 333 F.2d 974; *Davis v. F. W. Woolworth Co.*, 10CA (1931), 54 F.2d 366.

It has been heretofore established beyond contradiction that Brookdale Cemetery Association is the creature of the Brookdale Syndicate Number One agreement, a syndicate now consisting solely of plaintiffs, which furnished all of the $7,500.00 down payment necessary to acquire the land in question, subject to a $32,500.00 mortgage of record, as yet unpaid. The erroneous assumption that Defendants Lewis advanced any money for any purpose to purchase said land, not refunded, or have not been guilty of fraud, as originally charged by plaintiffs in the prior state action, *Harvey v. Lewis, supra,* 357 Mich. 305, at pp. 309 and 312, is clearly refuted by the order of the State court subsequently adjudicating them guilty of perpetrating a fraud of upwards of $89,750.00 upon Brookdale Cemetery Association (R. Plt. Exh. 33, 149a, 150a).

It has also been heretofore conclusively established that Brookdale Cemetery Association, after incorporation never authorized the issuance, or did issue any of its shares of stock to any person, firm or corporation, or lawfully engaged in the operation of any cemetery business. Its corporate powers were never lawfully revived after its Charter was immediately allowed to lapse on August 31, 1940 for failure to file any annual reports and pay any annual franchise fees pursuant to Michigan law. Similarly, the corporate powers of Brookdale, Inc., penniless and wholly without assets since incorporation, were also allowed to immediately lapse, and were never thereafter lawfully revived (R. 22a, 27a-29a, 38a).

Only plaintiffs, by virtue of their investment and syndicate membership, as was adjudicated by the state trial court, can now lawfully claim under Michigan law an equitable and beneficial ownership of the assets of defunct Brookdale Cemetery Association.

After dissolution, the receiver of a corporation obviously cannot start up a corporate business never actually previously engaged in, because there is no such corporation in contemplation of law. *Hurd v. Meyer,* 259 Mich. 190, 193. Yet, it is undisputed, as the plaintiffs charge, that contrary to Michigan law, which expressly forbids the sale of burial rights in mortgaged land (CL 1948, Sec. 456.109), and continuing, without a corporate charter, the business for which said corporation was organized (CL 1948, Sec. 450.75), Defendant John R. Starrs, as receiver of Brookdale Cemetery Association, after the aforesaid appeal, *Harvey v. Lewis, supra,* 357 Mich. 305, was submitted to the Supreme Court of Michigan, set Defendant Sydney List to selling burial rights and making upwards of 6,000 unlawful burials in said mortgaged land for upwards of $360,000.00, without making any provision whatever for the perpetual care thereof, also expressly required by Michigan law (CL 1948, Sec. 456.107, 456.107a).

Clothed with the authority of the state, and purporting to act thereunder, Defendant Starrs, as receiver of Brookdale Cemetery Association, in furtherance of the conspiracy charged, wrongfully using the power so possessed by him, also arbitrarily compromised the claim of his fellow defendant, Harris W. Wienner, for alleged services rendered Brookdale Cemetery Association and Brookdale, Inc., both defunct since 1940, submitted for the first time to further said conspiracy and never proven (R. Plt. Exh. 61, 195a-196a).

In *Powell v. Maryland Trust Co.,* 125 F.2d 260, 271, cert. denied 62 S. Ct. 1041, 316 U.S. 671, 86 L. ed, 1746, rehearing denied 62 S. Ct. 1273, 316 U.S. 711, 86 L. ed. 1777, it is said:

> "• • • it is well settled that the appointment of receivers for a corporation does not affect the rights of others to property in its possession. As

said by the Supreme Court in *Quincy etc. Railroad Company v. Humphreys,* 145 U.S. 82, 97, 12 S. Ct. 787, 36 L. ed. 632, as to the status of receivers. 'They were ministerial officers, appointed by the court of chancery to take possession of and preserve, pendente lite, the fund or property in litigation; mere custodians, coming within the rule stated in *Union Nat. Bank of Chicago v. Bank of Kansas City,* 136 U.S. 223, 236, 10 S. Ct. 1013 (34 L. ed. 341), where this court said: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody *as an officer of the court,* for the benefit of the party ultimately proved to be entitled, *but not to change the title or even the right of possession in the property.*" ' " (Emphasis added.)

Yet, as plaintiffs allege, Defendant Starrs, as receiver of Brookdale Cemetery Association, continuing to act in concert with Defendants Lewis and Tsangadas, clothed with the authority of the state, and purporting to act thereunder, wrongfully using the power possessed by him, without consideration whatever, other than the aim of defendants to unlawfully further their said conspiracy, created a stock register for defunct Brookdale Cemetery Association and issued a single certificate, purporting to represent all of its stock, to himself as receiver of Brookdale, Inc., and likewise, as receiver, created a new stock register of defunct Brookdale, Inc., and issued certificates of stock, representing 91.7% of its purported total authorized common stock to Defendants Lewis and Tsangadas. Thus, defendants concluded their conspiracy to destroy plaintiffs' adjudicated 100% ownership of the land in question as a corporate entity.

While clothed with the authority of the State, Defendant Starrs, as receiver of Brookdale Cemetery Association, totally dissipated upwards of $417,000.00 of its cash receipts, substantnally in fees, expenses and commissions paid to himself, his counsel and Defendant Sydney List, before it was disclosed he had secretly joined with his coconspirator, Defendant Sydney List, as a partner in the Eagle Stone and Monument Company purposefully organized to more fully exploit his receivership, and he was forced to resign on October 12, 1965 (R. 87a-88a). Defendant List was paid $85,000.00. Now, in addition to his secret earnings and his previous receivership fees (R. 57a), Defendant Starrs claims additional receivership fees of $60,000.00 for the period ending February 25, 1963, and also fees, undetermined as yet, from that date until October 12, 1965 (R. 88a).

In *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, at p. 991, it is said:

> "Having in mind such cases as *Cretes, Inc. v. Prudential Co.*, 322 U.S. 408, 64 S. Ct. 1075, 1079, 88 L. ed. 1356 and other cases cited below, we think the general principles applicable here are as follows: A receiver, as 'an officer or arm of the court,' is a trustee with the highest kind of fiduciary obligations. He owes a duty of strict impartiality, of 'undivided loyalty', to all persons interested in the receivership estate, and must not 'dilute' that loyalty. He is 'bound to act fairly and openly with respect to every aspect of the proceedings before the court.' * * * The court, as well as all interested parties, 'have the right to expect that all its officers,' including the receiver, will not 'fail to reveal any pertinent information or use their official position for their own profit or to further the interest of themselves or any associates.'"

In *Crites, Inc. v. Prudential Co.*, 322 U.S. 408 at p. 418, it is sad:

> "In this case, however, the fact that Simpkins entered into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretion incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as a co-receiver should have been denied him. Cf. *Woods v. City National Bank*, 312 U.S. 262, 268.

Despite the fact that said land was further immediately pledged to secure a $5,000.00 loan, as plaintiffs allege, the successor receiver of Brookdale Cemetery Association, Defendant Bernard Belk, has continued to sell burial rights and bury human bodies in said mortgaged land contrary to Michigan law, CL 1948, Sec. 456.109, *supra*.

Finally, as plaintiffs also allege, based solely on the petition of Defendant Harris W. Wienner, previously established as a judgment creditor by Defendant Starrs, for a Public Sale of Assets, contrary to Michigan law, which expressly forbids such a sale, CL 1948, Sec. 623.43, *supra*, the dedicated cemetery land was sold to a corporation *yet to be organized* (R. Plt. Exh. 62, 63, 197a-202a).

CONCLUSION

Wherefore, petitioners respectfully petition this Honorable Court to issue a writ of certiorari directed to the Court of Appeals for the Sixth Circuit commanding said Court to send to this Court a full and complete transcript of the record in said Court, to the end that this cause may be reviewed by this Court, and that the judgment of the Court of Appeals for the Sixth Circuit be reversed and such other relief be granted as to this Court may seem proper.

Dated this 18th day of August, A.D., 1967.

Respectfully submitted,

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